

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JACOP A. SNYDER)	
Claimant)	
)	
VS.)	
)	
VIEGA, LLC)	
Respondent)	Docket No. 5,034,425
)	
AND)	
)	
SENTINEL INSURANCE CO., LTD.)	
Insurance Carrier)	

ORDER

Claimant requested review of the December 10, 2013, Award by Administrative Law Judge Bruce E. Moore. This is a post-award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for the claimant. John M. Graham, Jr. of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the post-award record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found the record failed to establish, more probably than not, that claimant's L3-4 disc herniation on October 11, 2012, was the natural and probable consequence of a recurrent disc herniation on November 3, 2009. Further, the annular tear that predisposed claimant to a herniated disc at L3-4 preexisted the 2009 work accident, and there is no evidence the 2009 work accident caused or

aggravated claimant's annular tear. Therefore, the ALJ denied claimant's application for post-award medical care.

Claimant argues his 2012 medical condition and medical treatment, including the surgical fusion and need for future treatment, are a direct and natural result of his 2009 work-related injury based upon the testimony of Drs. Mellion and Stein. Claimant contends he is entitled to post-award medical treatment and payment of reasonable and related medical expenses to date.

Respondent maintains claimant's need for medical treatment is not the natural and probable consequence of his 2009 work injury, but rather is the result of claimant's personal health condition, degenerative disc disease, and the accident he sustained in October 2012; therefore, the ALJ's Award should be affirmed.

The sole issue before the Board is: Was the medical treatment resulting from a twisting incident on October 11, 2012 the direct and natural result of the November 3, 2009, work-related accident?

FINDINGS OF FACT

Claimant suffered a compensable injury to his low back on November 3, 2009, while working for respondent as a maintenance technician. While lifting a bag of material, claimant's back "made a loud popping noise and [his] legs gave out and [he] wound up collapsing onto the box."¹ Claimant was referred to Dr. B. Theo Mellion, a board certified neurosurgeon, on November 5, 2009. Dr. Mellion ordered an MRI and reported:

MRI of the lumbar spine revealed some desiccation and mild annular bulging at L3-L4 and L4-L5 with mild foraminal narrowing at L4-L5, there was an obvious broad-based central and right paracentral recurrent disc herniation at L5-S1 associated with some degeneration and disc collapse with bilateral foraminal narrowing, worse in the right than the left.²

When conservative treatment proved unsuccessful in resolving claimant's pain, he underwent surgery with Dr. Mellion on March 30, 2010. Claimant underwent "a right L5-S1 re-exploration hemilaminotomy, foraminotomy and excision of recurrent disc herniation and left L5-S1 hemilaminotomy and foraminotomy for nerve root decompression."³ Dr. Mellion noted claimant's postoperative recovery was unremarkable. Claimant was released to return to work with no restrictions on June 21, 2010.

¹ Claimant's Depo. at 20.

² Mellion Depo., Ex. 2 at 1.

³ *Id.* at 2.

On October 8, 2010, claimant settled this undocketed workers compensation case *pro se*. The parties agreed to settle on an amount reflecting Dr. David W. Hufford's rating of five percent impairment of function to the body as a whole, leaving future medical treatment open.⁴ Claimant did not again seek medical treatment for his low back until October 11, 2012.

Claimant continued to work for respondent as Safety Coordinator, an accommodated position, following his 2010 settlement. Claimant testified he and his family were at the McPherson Reuse It Center on Thursday, October 11, 2012, when claimant injured his back:

My foster child . . . would not stop messing with stuff. And I turned, I twisted at the waist to holler at him, to tell him to knock it off, to put it down, and at that point, my back popped, my legs got weak, and I went – my legs got real wobbly, and then I had an incredible onset of pain in my right and left leg.⁵

Claimant testified the pain was in multiple locations of his low back, but “it didn’t feel the same as it did before. Before, it was just like in 2009, it was one sharp pop. At the Reuse It Center, it felt different. It wasn’t just one sharp pop, it felt like one or two. It felt like just more.”⁶ Claimant stated the pain radiated up his spine to the middle of his upper back, across his lower back to the right and left, and immediately down the outside of both legs down to his toes. He stated in 2009 the pain radiated similarly to the right, but not as extensively.

Claimant testified he notified his supervisor the following day that he would not be at work due to the pain and intended to see a doctor on his own. Claimant presented at the hospital on Saturday, where he was given medication and released. On Monday, October 15, 2012, claimant again spoke to his supervisor, who then notified the insurance carrier of the incident. Claimant did not return to work after October 11, 2012.

Claimant continued to have pain and weakness, using a cane to walk. He returned to Dr. Mellion on November 15, 2012, with complaints of symptoms that became progressively worse, weakness in the right foot, urinary leakage with Valsalva maneuvers, and erectile difficulties. Claimant had with him another MRI:

⁴ Using the *AMA Guides to the Evaluation of Permanent Impairment* (4th ed.), Dr. Hufford rated claimant with a 10 percent impairment of function to the body as a whole, 5 percent of which was deemed to be preexisting.

⁵ Claimant's Depo. at 11.

⁶ *Id.* at 30.

An MRI of the lumbar spine dated November 9, 2012, revealed the previous hemilaminotomy at L5-S1 where there was disc degeneration, disc space collapse and another recurrent right paracentral disc herniation associated with some facet arthropathy. In addition there is degeneration in a smaller central and right paracentral disc protrusion at L4-L5 and a very large central and right paracentral disc herniation at L3-L4 causing severe compression of the thecal sac. . . . [Claimant] presented . . . with symptoms of early cauda equine syndrome as well as significant pain and therefore surgical decompression was recommended.⁷

Dr. Mellion opined claimant's "most dramatic problem" was the large disc herniation at L3-4, which could be an explanation for some, if not all, of claimant's symptoms.⁸ After discussing the various treatment options with claimant, Dr. Mellion performed surgery on November 16, 2012, which included excisions of the L3-4 herniated disc and recurrent disc herniation at L5-S1, L3-L1 laminectomies and foraminotomies, and L3-S1 transforaminal lumbar interbody fusions and placement of interbody cages. Dr. Mellion believed the surgery was reasonable due to claimant's structural changes and previous back problems.

Claimant has suffered multiple prior back problems. In 2006, he presented to Dr. Mellion with a history of progressively severe low back pain and radiating right buttock, hip, and leg pain with paresthesias which had not improved with conservative measures. Claimant's 2006 problems were not the result of a work-related accident or traumatic incident. An MRI taken at that time revealed some disc degeneration and annular bulging at L3-4 and L4-5 and a moderately large right paracentral disc herniation at L5-S1. Claimant underwent a right L5-S1 hemilaminotomy, microdiscectomy and foraminotomy on December 12, 2006. Claimant's postoperative recovery was uneventful, and he was eventually released to return to work with no restrictions in 2007.

Claimant again suffered back problems in 2008 after sustaining an injury at work. Claimant testified he sustained injury to his low back after catching a falling gearbox and pushing it back onto a table. He complained of pain in the low back radiating to the right buttock, hip, and leg. He also complained of neck pain with pain radiating into the left shoulder and arm, and numbness and tingling in his left fingers. Claimant reported the accident and began physical therapy, but did not pursue a workers compensation claim because he was afraid he would be terminated. An MRI taken in April 2008 revealed disc degeneration and central disc protrusions at L3-4 and L4-5 and postoperative changes at L5-S1, where there was also disc degeneration and a recurrent right paracentral posterior disc protrusion. An MRI of his cervical spine revealed diffuse degenerative changes with disc protrusions at C4-5, C5-6, and C6-7. Claimant underwent a three-level cervical discectomy and interbody fusion with Dr. Mellion on December 20, 2008. Claimant was

⁷ Mellion Depo., Ex. 2 at 2.

⁸ Mellion Depo. at 21.

released to return to work with no restrictions on February 5, 2009. Claimant did not seek medical treatment related to his low back until November 3, 2009.

Dr. Paul S. Stein, a board certified neurosurgeon, first examined claimant in February 2010 for purposes of an independent medical examination at the request of Medical Consultants Network. Dr. Stein again examined claimant at his counsel's request on December 13, 2012, for independent medical evaluation purposes. Claimant presented in 2012 with complaints of persistent low back pain into both buttocks and both thighs and throbbing into his right lower extremity. Claimant indicated to Dr. Stein he used a walker and a wheelchair for distances. Additionally, Dr. Stein reported claimant had constant right lower extremity numbness and urological and erectile dysfunctions.

Dr. Stein reviewed the provided medical records, though he reported they were incomplete. He indicated he would need more complete records before making a final determination, but based upon the information available, opined:

The surgery performed, based on my review of a postoperative myelogram/CT scan, was laminectomy and decompression from L3 to S1 with bilateral instrumented posterolateral fusion and interbody fusion grafting. This is most consistent with the major pathology having been the L3-L4 stenosis. If that is the case, it is unlikely that there is a causal relationship between his previous L5-S1 disk protrusions and the symptomatology in 2012.⁹

Dr. David W. Hufford, a physician board certified in family practice and sports medicine, first examined claimant on August 3, 2010, when he provided the rating that was the basis for claimant's 2010 workers compensation settlement. Claimant returned to Dr. Hufford on January 8, 2013, for purposes of an independent medical examination and causation opinion. After reviewing claimant's medical records, history, and performing a physical examination, Dr. Hufford's impression was low back pain with right leg radiculopathy following non-occupational aggravation of degenerative disc disease, status post L5-S1 lumbar fusion. He recommended claimant undergo intensive physical therapy and rehabilitation, and noted claimant was unable to return to work and capable only of sedentary activities. Dr. Hufford noted claimant was not at maximum medical improvement nor could he estimate when that might occur. Dr. Hufford noted in his report:

The work injury that occurred on November 3, 2009 is not the prevailing factor in relationship to the non-occupational injury which occurred on October 11, 2012. There is evidence in the record of pre-existing degenerative disc disease at L3-L4, L4-L5 and L5-S1 including a non-traumatic disc herniation at L5-S1 requiring surgery in December, 2006. There is no evidence that the work injury at

⁹ Stein Depo., Ex. 2 at 10.

[respondent] has any relationship to the non-occupational injury which occurred on October 11, 2012.¹⁰

Dr. Hufford opined the October 2012 incident was the culmination and consequence of years of degenerative disc changes. He testified:

I felt that this gentleman clearly had pre-existing degenerative disc disease, a non-occupational previous surgery. He had one reported specific work injury which resulted in a recurrent disc herniation at one level, but his surgery that was performed was carried out over three levels and the surgery that was performed I do not believe was necessitated by any previous work injury that he had sustained.¹¹

Claimant's counsel requested a causation opinion from Dr. Mellion, who wrote in a letter dated February 7, 2013:

In my opinion, based on medical probability, [claimant] would not have injured his low back on November 11, 2012 [sic] while performing a normal daily living activity such as twisting, had he not had a previous discectomy and suffered his prior work related low back injury in 2009. Stated another way, it is more likely than not, based on a reasonable degree of medical certainty, that [claimant's] current low back condition, which necessitated additional surgery as outlined above, is likely a natural and direct result of his 2009 work accident.¹²

After receiving and reviewing the requested November 9, 2012, MRI images and conferring with claimant's counsel, Dr. Stein issued a supplemental report on February 26, 2013. Regarding his causation opinion, Dr. Stein wrote:

It remains my opinion that the primary pathology occurring on 10/11/12 was the disk herniation at L3-L4. There is some question as to whether his previous work injury had some effect on the L3-L4 disk making it more likely to herniate. Although I do not believe it is very likely to alter my previous statement regarding causation, it might be helpful to review of the previous lumbar MRI scans.¹³

Dr. Stein eventually received claimant's previous lumbar MRI scans, and after review of the same, issued another supplemental report on April 2, 2013. His review of claimant's April 2008 MRI revealed "a small to moderate central and rightward disk

¹⁰ Hufford Depo., Ex. 3 at 2.

¹¹ Hufford Depo. at 15-16.

¹² Mellion Depo., Ex. 2 at 2.

¹³ Stein Depo., Ex. 2 at 12.

protrusion . . . at L4-L5 with a posterior annular tear. At L3-L4 there is a central disk bulge with an annular tear.”¹⁴ This finding changed Dr. Stein’s opinion regarding causation:

In regard to the incident of October, 2012, it has been my opinion that the disk herniation at L3-L4 was unrelated to his previous work injuries. This was based upon the fact that the previous large disk herniations and surgeries were carried out at L5-S1. On 2/26/13 I indicated that there was some previous work injury [that possibly] had some effect on the L3-L4 disk making it more likely to herniate and I indicated I would be willing to review the previous studies. The above studies show that there was a damaged disk at L3-L4 as well as L4-L5 in 2008 & 2009. At L4-L5 it appears that the annular tear may have at least partially healed by 2009 but, at L3-L4, there is still a posterior annular tear. In my opinion, within a reasonable degree of medical probability, these studies show that there was damage present at the L3-L4 disk in 2009 with annular tear and early herniation. This predisposed the disks to herniation in the future.

. . . .

In summary, reviewing the above MRI scans has altered my opinion regarding causation of the L3-L4 disk herniation in October of 2012. The twisting action may have been a precipitating factor but the disk had been previously injured and was pre-destined to herniate because of the injury to the annulus.¹⁵

Dr. Stein stated because a central disc bulge and annular tear existed in 2008, claimant was predisposed to disc herniation.¹⁶ Claimant’s prior injuries predisposed him to a disc herniation, changing Dr. Stein’s causation opinion. Dr. Stein explained:

[B]ased on the fact that in 2008 there was a central disc bulge and annular tear. Now, I am making the assumption that disc bulge and annular tear was caused by the same accident that caused the recurrent disc herniation at L5-S1. If that is true, then the relationship stands.¹⁷

Dr. Stein further stated that if the above assumption was not true, then he could not make any statement or relationship about it.

¹⁴ *Id.* at 13.

¹⁵ *Id.* at 13-14.

¹⁶ Dr. Stein later testified, “To my recollection, I never saw any imaging studies prior to the 2009 injury.” (Stein Depo. at 14.) Dr. Stein’s records reflect he first discerned the L3-4 annular tear in an MRI dated April 8, 2008.

¹⁷ Stein Depo. at 12.

In light of Dr. Stein's changed opinion, Dr. Mellion offered his causation opinion based upon Dr. Stein's finding of an annular tear at L3-4. However, the impression given during his deposition is that Dr. Stein first saw the annular tear in films subsequent to claimant's November 2009 accident:

Q. And so do you believe, in essence, that the – as Dr. Stein has opined that there is a cause-and-effect relationship between the work-related accident in 2009 and [claimant] suffering a large herniated disc at L3-4 with a simple twisting movement?

A. Well, I think there is a relationship between the two. He happened to have a very large disc herniation; it could have been a smaller disc herniation, but the fact that he, and in my notes he'd always had some protrusion of the L3-4 disc. I don't have the films in front of me and I didn't review them again as Dr. Stein did, but certainly if the annular tear was not there in 2006, but was there after the 2009 injury, then there was clearly a change. And, yes, I think this is a reasonable assessment that having that there does predispose to having a disc herniation. Given those facts, it is reasonable to assume that the events are, in fact, related.¹⁸

Although Dr. Mellion did not review claimant's MRIs again, he opined, "If truly there was just some annular bulging back in 2006, but not the annular tear with Dr. Stein noted was there after 2009 but not in 2006, then it would be hard to connect [claimant's 2006 condition and claimant's 2012 condition]. Whereas, if the annular tear, which was a progression of the problem which he had, were the result of a work-related accident then you could connect the two."¹⁹

Drs. Hufford, Mellion, and Stein agreed trauma is not necessary to cause a disc herniation. A disc can rupture while bending to pick up a paper clip, sneezing, with sexual activity, or while playing sports.²⁰ Many discs herniate without an injury.²¹

Claimant testified he has been unable to receive the recommended therapy due to a conflict between his personal health insurance carrier and the workers compensation insurance carrier. Neither carrier will accept responsibility for claimant's care. The health insurance carrier contends claimant's 2012 injury is a result of his 2009 injury and therefore denies responsibility, while the workers compensation carrier maintains claimant's injury is not work-related and should be covered by his personal health insurance.

¹⁸ Mellion Depo. at 34-35.

¹⁹ *Id.* at 41-42.

²⁰ Hufford Depo. at 14; Mellion Depo. at 39.

²¹ Stein Depo. at 13.

Claimant testified he currently treats with prescribed pain medications which do little to provide relief. He stated his low back pain level is, on average, an 8 or 9 on a pain scale of 10. Claimant has suffered right foot drop and has worn an ankle foot orthotic since January 2013.

Claimant has not worked since October 11, 2012, and currently draws long-term disability benefits.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-510k(a) states, in part:

The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.²² Accordingly, the findings and conclusions set forth reflect the majority's decision and the signatures below attest that this decision is that of the majority.

ANALYSIS

Claimant argues that his low back condition leading to a surgery in 2012 is the direct and natural result of his 2009 work-related accidental injury. In *Jackson v. Stevens Well Service*,²³ the Kansas Supreme Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, *including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.* (Syl. ¶ 1.) [Emphasis added.]

The secondary injury rule allows an injured employee to receive compensation for all of the natural consequences arising out of an injury, including any new and distinct injury that is a direct and natural result of the primary injury.²⁴ However, compensation is not warranted when the increased disability resulted from a new and separate accident.²⁵

²² K.S.A. 2012 Supp. 44-555c(k).

²³ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

²⁴ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 515, 154 P.3d 494 (2007).

²⁵ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973); *Logsdon v. Boeing*, 35 Kan.App.2d 79, 85, 128 P.2d 430 (2006).

The Board agrees with the ALJ that claimant has failed to prove that his L3-4 disc herniation was the direct and natural result of the 2009 accidental injury and adopts by reference the findings of fact and conclusions of law contained in the December 10, 2013, Award. The evidence is clear that, as far back as 2006, claimant had a documented annular bulge at L3-4 and L4-5. Dr. Stein noted a 2008 MRI of the lumbar spine that showed disc protrusion at L4-5 with a posterior annular tear and a central disc bulge at L3-4 with an annular tear.

On November 16, 2012, Dr. Mellion performed surgery for an L3-4 herniated disc and a recurrent disc herniation at L5-S1. Dr. Mellion testified that the herniation at L3-4 was a new structural change compared to his findings in 2009.²⁶ He stated that within a reasonable degree of certainty the new condition was related to the 2009 injury.²⁷ Dr. Mellion then testified that if the annular tear was the result of the 2009 accident, then the new finding at L3-4 would be connected to the 2009 accident.²⁸ Based upon Dr. Stein's April 2, 2013, report and testimony, annular tears at L3-4 and L4-5 were present one year prior to the 2009 accident.

Dr. Stein testified that he could not find a relationship between the 2009 accident and the L3-4 disc herniation if the annular tear was present prior to the 2009 accident.²⁹ Dr. Stein agreed that the annular tear predisposed claimant to herniation in the future.³⁰ Dr. Mellion testified claimant would be predisposed to future herniation by the annular tear. Dr. Mellion later said that if the annular tear was not present in 2006, but present after the 2009 injury, there would be an injury. While the annular tear was not present in 2006, evidence shows that there was an annular tear at L3-4 in 2008, prior to the 2009 injury.

CONCLUSION

Claimant has failed to prove medical treatment resulting from a twisting incident on October 11, 2012, was the direct and probable result of the November 3, 2009, accidental injury.

²⁶ Mellion Depo. at 20.

²⁷ *Id.* at 31.

²⁸ *Id.* at 42.

²⁹ Stein Depo. at 12.

³⁰ *Id.*

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated December 10, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2014.

BOARD MEMBER

BOARD MEMBER

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